

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY RITTER, a Minor, by and through his
Next Friend and Mother CHERI A. RITTER,

UNPUBLISHED
May 16, 2006

Plaintiff-Appellee,

v

AIRPORT COMMUNITY SCHOOLS and
AIRPORT COMMUNITY SCHOOLS BOARD
OF EDUCATION,

No. 258999
Monroe Circuit Court
LC No. 02-014913-NO

Defendants-Appellants,

and

CARLETON BOARD OF EDUCATION

Defendant,

and

WADE FRYE,

Defendant-Appellee.

Before: Jansen, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Plaintiff Jeffrey Ritter was injured when his arm broke through a wired glass panel in a gymnasium door at the Airport Senior High School in Carleton, Michigan. Plaintiff brought this action against defendants Airport Community Schools and Airport Community Schools Board of Education (hereinafter "defendants"), alleging that the wired glass door was a defective condition in a public building, thus precluding defendants from relying on the defense of governmental immunity. Defendants moved for summary disposition, arguing that the public building exception, MCL 691.1406, was not applicable. The trial court denied defendants' motion. Defendants appeal as of right. We reverse.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 711; 686 NW2d 825 (2004). The standard for reviewing a motion under MCR 2.116(C)(7) is as follows:

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. If such documentation is submitted, the court must consider it. If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hosp & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995) (citations omitted).]

If the pleadings or other documentary evidence reveal that there is no genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Absent an exception, governmental entities are immune from liability when engaged in the exercise or discharge of a governmental function, MCL 691.1407(1). Here, plaintiff relies on the public building exception to governmental immunity, MCL 691.1406. To establish this exception, a plaintiff must prove that:

1) a governmental agency is involved, 2) the public building in question is open for use by members of the public, 3) a dangerous or defective condition of the public building itself exists, 4) the governmental agency had actual or constructive knowledge of the alleged defect, and 5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. [*Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 421; 487 NW2d 106 (1992), amended 440 Mich 1203 (1992).]

The public building exception relates to dangers actually presented by the building itself. *Id.* at 422.

A public building may be dangerous or defective because of improper design, faulty construction, or absence of safety devices. However, a court should only look to the uses or activities for which the public building is assigned to determine if a dangerous or defective condition exists. Clearly, the question is not only whether the physical condition caused the injury incurred, but also whether the physical condition was dangerous or defective under the circumstances presented. [*Id.* (citations omitted).]

We agree with defendants that plaintiff failed to show that the wired glass door was a defective or dangerous condition in the building at the time of plaintiff's accident.

It is undisputed that the school was constructed in 1972. In support of his conclusion that the wired glass door was defective, plaintiff's expert relied on the International Building Code of 2003, and other unidentified building codes. Plaintiff's expert averred that the standard for evaluating the safety of glazing materials in buildings "was adopted in 1966, and referenced in building codes soon thereafter." Further, applicable test requirements for glass have been "disregarded by many designers and builders," and because wired glass does not meet the requirements and the building codes, it is defective.

Apart from the International Building Code of 2003, however, plaintiff's expert did not indicate where or when Michigan adopted the standard and requirements, and he did not cite any actual building codes that supported his position. The amendments to the Michigan Building Code that adopted portions of the International Building Code of 2003 were not effective in Michigan until February 29, 2004, more than two years after plaintiff was injured. Under § 102.6 of the 2003 Michigan Building Code, existing structures were not required to be updated to satisfy the new standards. Moreover, plaintiff does not identify any provision in either the International Building Code of 2003 or the 2003 Michigan Building Code indicating that the use of wired glass is prohibited in existing structures.

Defendants, on the other hand, established through the affidavit of their expert that the wired glass door complied with applicable building code regulations in existence both when the school was constructed and at the time of plaintiff's accident.

Furthermore, in order to establish liability under the public building exception, a plaintiff must establish that the governmental agency had actual or constructive knowledge of the alleged defect. The parties do not dispute that defendants did not have actual notice of a defective condition. "Constructive notice is demonstrated by showing that the agency should have discovered the defect in the exercise of reasonable diligence." *Ali v City of Detroit*, 218 Mich App 581, 586-587; 554 NW2d 384 (1996). In this case, we agree that plaintiff cannot establish constructive notice of a defective condition where the evidence showed that the wired glass door complied with applicable code regulations in effect at the time of the accident in 2001. Additionally, even assuming that wired glass is now prohibited in schools under the International Building Code of 2003, this latter code was not effective in Michigan until February 2004, and it does not establish constructive notice of a defective condition in 2001.

For these reasons, the trial court erred in denying defendants' motion for summary disposition. In light of our decision, it is unnecessary to consider defendants' remaining issues on appeal.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Brian K. Zahra